TR Nyipa ak Tingang (suing on behalf of themselves and 63 doors of other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land surrounding Ulu Sungai Kakus and Ulu Sungai Merirai) v Pusaka KTS Forests Plantation Sdn Bhd & Ors

HIGH COURT (BINTULU) — SUIT NO BTU-21–4/2 OF 2012
JOHN KO WAI SENG JC
26 JULY 2012

Civil Procedure — Injunction — Application for interlocutory injunction — Whether plaintiff's conduct warranted injunctive relief — Whether plaintiff failed to make full and frank disclosure when applying for ex parte interim injunction and failed to serve ex parte order on affected party as mandated by Rules of Court — Whether plaintiff's dilatory conduct of proceedings showed lack of urgency in wanting fast injunctive relief — Whether balance of convenience favoured injunction not being granted

The plaintiff had obtained an ex parte interim injunction ('the ex parte injunction') to restrain the first defendant, which held licences for planted forests ('LPF') granted to it by the other defendants, from trespassing, occupying or carrying out any form of work over an area over which the plaintiff claimed, inter alia, native customary rights ('NCR'). On the inter partes hearing to consider whether the ex parte injunction should be converted into an interlocutory injunction until the disposal of the suit or that it ought to be disallowed, the first defendant submitted that (i) the court had no power to extend the life of the ex parte injunction beyond 21 days based on O 29 r 1(2B) of the Rules of the High Court 1980 ('RHC') and that (ii) the affidavit in support of the application for the ex parte injunction failed to make full and frank disclosure of facts as required by O 29 r 1(2A)(c), (d) and (e) of the RHC. The ex parte injunction was granted on 20 January 2012 and the return date to hear the application inter partes was 30 January 2012. On the return date the first defendant failed to attend court owing to the plaintiff's failure to serve the ex parte injunction order, the application and supporting affidavit ('the cause papers') on the first defendant. On the plaintiff's request for an adjournment to enable service to be effected, the court adjourned the hearing to 14 February 2012. It was later discovered the plaintiff had served the cause papers on the first defendant on the very morning of 30 January 2012. Under O 29 r 1(2BA) of the RHC an ex parte interim injunction must be served on the relevant party within one week of the date of the order granting the injunction.

Held, dismissing the application for the interlocutory injunction with costs and awarding damages to the first defendant to be assessed by the registrar)

(1) The plaintiff's conduct did not warrant the court to exercise its discretion to grant him the interlocutory injunction. The plaintiff failed to show utmost good faith by failing to comply with the seven-day service requirement of the ex parte interim injunction (as required by O 29 r 1(2BA) of the RHC) and to comply with the duty to disclose when applying for it (as required by O 29 r 1(2A)(c), (d) and (e) of the RHC) (see para 16).

(2) The plaintiff had not come with clean hands for the interlocutory injunction. His conduct subsequent to the grant of the ex parte interim injunction had been dilatory. In failing to serve the cause papers within seven days of the order, the urgency in wanting fast track injunctive relief became suspect. He also failed to conduct the application in an expeditious manner thereby allowing the hearing to be prolonged (requesting for a month to file affidavit in reply to the first defendant's three affidavits), again showing there was no urgency in wanting fast injunctive relief (see para 23).

(3) There was a bona fide serious issue made out as to whether the NCR land was subject to the plaintiff's NCR. Also, on a commercial consideration, the balance of convenience lay with the first defendant. It was possible the plaintiff would be unable to pay the loss suffered by the first defendant if its project was delayed which would have had serious repercussions financially and on the LPF licences. Monetary compensation for the trespass and damage caused to the NCR land would be an adequate remedy to the plaintiff. There was nothing to show the first defendant would be unable to pay the damages that may be awarded (see para 25).

[Bahasa Malaysia summary

Plaintif telah memperolehi injunksi interim ex parte ('injunksi ex parte') untuk menghalang defendan pertama, yang memegang lesen untuk hutan ditanam ('LPF') yang diberikan kepadanya oleh defendan-defendan yang lain, daripada menceroboh, menduduki atau menjalankan apa-apa bentuk kerja atas kawasan yang dituntut oleh plaintif, antara lain, tanah hak adat ('NCR'). Atas pendengaran inter partes untuk mempertimbangkan sama ada injunksi ex parte patut ditukar kepada injunksi interlokutori sehingga pendengaran tindakan tersebut atau ia patut ditolak, defendan pertama berhujah bahawa (i) mahkamah tidak mempunyai kuasa untuk melanjutkan hayat injunksi ex parte melebihi 21 hari berdasarkan A 29 k 1(2B) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan bahawa (ii) afidavit menyokong permohonan untuk injunksi ex parte gagal untuk membuat pendedahan penuh dan berterus terang mengenai fakta seperti yang dikehendakki oleh A 29 k 1(2A)(c), (d) dan (e) KMT. Injunksi ex parte diberikan pada 20 Januari 2012 dan tarikh semula

untuk mendengar permohonan inter partes adalah pada 30 Januari 2012. Pada tarikh mendengar semula defendan pertama gagal untuk menghadiri mahkamah kerana plaintif gagal untuk menyerahkan perintah injunksi ex parte tersebut, permohonan dan afidavit menyokong ('the cause papers') ke atas defendan pertama. Atas permintaan plaintif untuk penangguhan untuk membolehkan penyerahan dilaksanakan, mahkamah menangguhkan pendengaran ke 14 Februari 2012. Ia kemudiannya didapati plaintif telah menyerahkan 'cause papers' ke atas defendan pertama pada pagi-pagi 30 Januari 2012. Di bawah A 29 k 1(2BA) KMT injunksi interim ex parte mesti diserahkan ke atas pihak yang relevan dalam masa satu minggu dari tarikh perintah memberikan injunksi tersebut.

Diputuskan, menolak permohonan untuk injunksi interlokutori dengan kos dan mengawardkan ganti rugi kepada defendan pertama ditaksirkan oleh pendaftar:

(1) Tindakan plaintif tidak mewajarkan mahkamah melaksanakan budi bicaranya untuk memberikan dia injunksi interlokutori tersebut. Plaintif gagal menunjukkan niat baik kerana gagal untuk memenuhi kehendak penyerahan tujuh hari injunksi interim ex parte tersebut (seperti yang dikehendakki oleh A 29 k 1(2BA) KMT) dan untuk mematuhi tugas untuk mengemukakannya apabila memohon untuknya (seperti yang dikehendakki oleh A 29 k 1(2A)(c), (d) dan (e) KMT) (lihat perenggan 16).

(2) Plaintif tidak menunjukkan niat baik untuk injunksi interlokutori. Tingkah lakunya selepas pemberian injunksi interim ex parte tersebut telah terlambat. Dalam kegagalan untuk menyerahkan 'cause papers' dalam masa tujuh dari perintah tersebut, pendesakan untuk relief injunktif cepat adalah dicurigai. Dia juga gagal untuk melakukan permohonan tersebut dalam cara yang paling cepat oleh itu membenarkan pendengaran tersebut menjadi berpanjangan (memohon sebulan untuk memfailkan afidavit jawapan kepada tiga afidavit defendan pertama), sekali lagi menunjukkan tidak terdapat tindakan segera dalam mengkehendakki relief injunktif cepat (lihat perenggan 23).

(3) Terdapat isu serius bona fide dibuat terhadap sama ada tanah NCR adalah tertakluk kepada NCR plaintif. Juga, atas pertimbangan komersial, imbangan kebarangkalian terletak ke atas defendan pertama. Adalah mungkin plaintif tidak dapat membayar kerugian yang dialami oleh defendan pertama jika projeknya ditangguhkan yang akan mempunyai kesan yang serius dari segi kewangan dan atas lesen LPF. Pampasan kewangan untuk pencerobohan dan kerosakan yang dilakukan kepada tanah NCR akan menjadi remedi wajar kepada

plaintif. Tidak terdapat apa-apa untuk menunjukkan defendan pertama tidak boleh membayar ganti rugi yang mungkin diawardkan (lihat perenggan 25).]

Notes

For cases on application of interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2012) paras 3374–3388.

Cases referred to

Arthur Anderson & Co v Interfood Sdn Bhd [2005] 6 MLJ 239, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (folld)
Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)
Malaysian Merchant Marine Berhad & Ors v BHLB Trustee Berhad & Ors [2010] MLJU 1171; [2010] 1 LNS 640, HC (refd)
Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 29 rr 1(2A)(c), (d), (e), 1(2B), (2BA)

Simon Siah (Baru Bian) for the plaintiff.
Tan Thiam Teck for the first defendant.
Joseph Chioh s/in for the SFC.
Joseph Chioh for the third and fourth defendants.

John Ko Wai Seng JC:

RULING

BACKGROUND

Facts of the case

[1] On the 20 January 2012, an interim injunction was granted ex parte for an injunction to be issued to restrain the first defendant, the holder of Licences for Planted Forests No LPF/0012 and 0013 issued to them by the other defendants (LPF Licenses), whether by themselves or by its servants or agents or otherwise, from commencing any ground works or activities, including trespassing, clearing, constructing, planting, surveying, or occupying the native customary right (NCR) area and the buffer zone located within the LPF licences area which are delineated in red in the locality maps marked as exh 'A' (the 'NCR land') and exh 'B' ('Buffer Zone') respectively and annexed to the statement of claim.

[2] The plaintiff is suing for himself and the inhabitants of the 63 *bilik* or apartments of Rumah Nyipa. The other relevant facts of the case are set out in paras 1–11 of the statement of claim.

[3] According to the plaintiff, the NCR land and the buffer zone of the plaintiff and inhabitants of Rumah Nyipa had been acquired or created before the first day of January 1958 by their ancestors where they dwelled, occupied, and cultivated, and subsists as such to this day as stated in para 7 of the statement of claim.

[4] According to para 8 of the statement of claim within the NCR land are caves situated at Ulu Sungai Kakus and Ulu Sungai Merirai, Sebauh, Bintulu where the plaintiff and inhabitants' ancestors have used to collect edible birds' nests as follows:

(1) bird's nest cave at Pasen Akik Bukok, Sungai Bekuyat, Kakus, Tatau;

(2) bird's nest cave at Pasen Tagari, Sungai Bekuyat, Kakus, Tatau; and

(3) bird's nest cave at Pasen Doet, Sungai Bekuyat, Kakus, Tatau.
(The 'caves')

[5] The third and/or fifth defendants had issued and had continued to issue to the plaintiff and the inhabitants of Rumah Nyipa (63 apartments) with yearly licence to collect edible 'black nest swiftlets' from the caves (pursuant to the Wildlife (Edible Birds' Nests) Rule 1998).

[6] By a Memorandum No DF89901 (*Jld* 9)–30 dated the 12 December 2011 the third defendant had informed the Forestry Department of Bintulu that the Buffer Zone should have already been marked as the buffer zone for the caves as recommended by the third defendant in their letter dated 28 June 2001. (This letter dated 28 June 2001 from the third defendant informed the plaintiff and the first defendant that the 60 meter buffer zone is within the limestone block where the caves are situated and the third defendant also attached a proposed 60 meter buffer zone required by the National Park and Wildlife office.)

[7] The first defendant denies the plaintiff's right to claim for the NCR land within the LPF licences area. The setting up of the buffer zone within the LPF licences area to serve the caves had been delayed by dispute over its boundaries and that the first defendant are in the meantime lawfully felling and extracting timber based on the LPF Licenses.

Pleadings

[8] On the inter partes hearing to consider whether the ex parte interim

injunction should be converted into an interlocutory injunction until the disposal of this suit or it ought to be disallowed the court is referred to the following pleadings filed:

(a) the writ of summons dated 19 January 2012 and statement of claim dated 18 January 2012;

(b) the ex parte summons in chambers under O 29 r 1(1) of the RHC 1980 dated the 19 January 2012 (the 'application');

(c) the plaintiff's affidavit in support affirmed on the 19 January 2012 ('Nyipa's affidavit 1');

(d) the order for ex parte interim injunction dated 20 January 2012 (the 'order');

(e) the first defendant's defence and counterclaim dated 1 March 2012;

(f) the first defendant's affidavit in opposition 1 affirmed on 1 March 2012 ('Tang's affidavit 1');

(g) the first defendant's affidavit in opposition 2 affirmed on 16 March 2012 ('Romy's affidavit');

(h) the first defendant's affidavit in opposition 3 affirmed on 16 March 2012 ('Roslan's affidavit');

(i) the plaintiff's reply and defence to first defendant's counterclaim dated 12 April 2012;

(j) the plaintiff's affidavit in reply affirmed on 12 April 2012 ('Nyipa's affidavit 2');

(k) the plaintiff's affidavit in reply 2 affirmed on 13 April 2012 ('Nyipa's affidavit 3'); and

(l) the first defendant's affidavit in opposition 4 affirmed on 20 April 2012 ('Tang's affidavit 2').

[9] After the plaintiff's submission was received, there was a late filing by the first defendant on 14 June 2012 of the first defendant's affidavit in opposition 5 ('Jack's affidavit') affirmed on 13 June 2012 which the court will not consider.

The plaintiff's grounds of application

(a) That the plaintiff's claim for the NCR land and buffer zone is based on NCR which requires evidences to be adduced at a proper trial of this case and cannot be disposed of by affidavit and documents only;

(b) that from the relevant documents to date as stated in the statement of claim, the plaintiff and Rumah Nyipa (63 apartments/*bilik*) in all

probability would succeed in their claims for the NCR land and buffer zone within the LPF licences and LPF/0033 areas;

(c) that the ecosystem inside the buffer zone to serve the caves will be endangered and would seriously harm the breeding, life and environment of the swiftlets which cannot be compensated with any amount of monies and/or damages; and

(d) or as stated in the plaintiff's affidavits filed in support of the application.

PRELIMINARY ISSUES: NON-COMPLIANCE

[10] The court is of the view that it is material to consider these submissions of the first defendant because it will enable the court to gauge the bona fides and probity of the plaintiff and in particular whether the plaintiff has come to court with clean hands for equitable relief to entitle it to the grant of the interlocutory injunction.

Expiry of interim injunction for buffer zone

[11] Learned counsel for the first defendant submitted that the court has no power to extend the ex parte interim injunction for the buffer zone beyond 21 day period of its life based on O 29 r 1(2B) of the Rules of the High Court 1980 ('RHC'):

> Unless sooner revoked or set aside, an interim injunction obtained on an ex-parte application *shall automatically lapse at the end of 21 days* from the date on which it is granted. (Emphasis added.) See *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433.

[12] On the 20 January 2012 the High Court in Kuching granted the ex parte interim injunction against the first defendant on the buffer zone. According to the order, the hearing of the interlocutory injunction for the Buffer and NCR land and removal of machinery from the NCR land would be heard on the return date of 30 January 2012. The High Court in Kuching also ordered the case to be transferred and heard by the Bintulu High Court on its return date 30 January 2012

[13] At the hearing on the 30 January 2012 after 9am, only the second to fifth defendants had attended in court. The court was informed by learned counsel for the plaintiff that the first defendant had not been served with the order for the ex parte interim injunction, application and Nyipa's ffidavit 1 and requested the matter to be adjourned to enable service to be effected. The court had adjourned the hearing to the 14 February 2012. The order for the ex parte

interim injunction, application and Nyipa's affidavit was served on the first defendant on 30 January 2012 at 9.40am.

[14] With respect to learned counsel for the first defendant, the issue on the facts before the court is not the matter of the expiry of the ex parte interim injunction but what caused it to run foul over compliance with O 29 r 1(2BA) of the RHC 1980 which provides:

> (2BA) *The ex parte interim injunction must be served on the relevant party within one week of the date of the order granting the interim injunction*, and the Court when granting the injunction must forthwith fix a date for inter partes hearing to be held before the expiry of the 21 days. (Emphasis added.)

[15] If there is a default of service within the seven days, in *Malaysian Merchant Marine Berhad & Ors v BHLB Trustee Berhad & Ors* [2010] MLJU 1171; [2010] 1 LNS 640, Abdul Aziz b Abdul Rahim J had held:

> 36. In respect of O 29 r 1(2BA), the plaintiff has failed to serve the sealed copy of the ex parte injunction order obtained on 4 May 2010 within one week of the order on the defendant as required by the rule. *Compliance with this rule has been held mandatory and any breach of it is fatal to the applicant*. This is because the inter partes hearing of an ex parte injunction is fixed by the rule to be held before the expiry of 21 days from the date of the ex parte order. Thus, it is implicit in the rule that delay will not be tolerated. Therefore it is imperative that the plaintiff served the ex parte order within one week from the date it is obtained: *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433.
>
> (Emphasis added.)

[16] Litigants having put into motion an extreme measure like an ex parte interim injunction will be required by the court to strictly comply with the law and the failure to comply with the order to serve the ex parte interim injunction within seven days will be viewed as an act of bad faith on the part of the defaulter as to disentitle him from asking for further discretionary interlocutory relief from the court on the same subject matter.

Non-compliances with O 29 r 1(2A)(c), (d) and (e) of the RHC 1980

[17] Learned counsel for the first defendant had raised the non-compliances of O 29 r 1(2A)(c), (d) and (e) of the RHC 1980 in the Nyipa's affidavit 1 in support of the application for grant of the ex parte interim injunction.

[18] On this in *Malaysian Merchant Marine Berhad & Ors* Abdul Aziz b Abdul Rahim J had also held:

> 35. There is also non-compliance with O 29 r 1(2A) and r 1(2BA). In respect of O 29 r 1(2A), the plaintiffs' affidavit in support does not contain any clear statement of the matters sought by the rule under sub-para (c) and (e). Under these two paragraphs the applicant is required to state in the affidavit the facts relied on to justify the ex parte application including details of any notice given to the defendants and if none is given the reason for not giving none and of any facts known to the applicant which may lead the court not to grant relief ex parte. This is a nutshell the principle for full and frank disclosure. … Such omission by the plaintiffs is clear breach of the rule and obvious non-compliance: *Datuk James Wong Kim Min & Anor v Dato Seri Peter Tinggom Kamarau & Ors* [2003] 6 CLJ 381, 389.

[19] On the effect of the failure to comply with the requirements of O 29 r 1(2A)(c), (d) and (e) of the RHC 1980 according to *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239 (para 48, Richard Malanjum JCA (as he was) in the context of an Anton Pillar had cited in approval Gopal Sri Ram JCA (as he was) in *Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 at p 611:

> The provisions of O 29, r 1(2A) were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 1(2A) is not defeated, *High Courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a Mareva or an Anton Filler type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders*.
>
> Having perused the affidavit in question, we find that there has not been even a feeble attempt to meet the requirements of r 1(2A), especially sub-para (d) thereof. *On this ground alone, the ex parte injunction ought to have been dissolved by the learned judge*.
>
> (Emphasis added.)

[20] The court finds that the failure of the plaintiff to comply with O 29 r 1(2A)(c), (d) and (e) of the RHC 1980 in the Nyipa's affidavit 1 in support of the application for grant of the ex parte interim injunction would have meant that ex parte interim injunction could have been set aside by the first defendant.

Effect of non-compliances and merits

[21] In *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316 Richard Malanjum JCA (as he then was) at para 33 at p 328 E had this to say:

It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. In *Siporex Trade SA v Comdel Commodities Ltd* (1986) 2 Lloyd's Law Rep 428, His Lordship Bingham J (as he then was) said this at p 437:

> Failure to make full and fair disclosure
>
> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. … If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.

[22] On the plaintiff's failure to show utmost good faith by complying with the seven day service requirement of the ex parte interim injunction for the buffer zone and the duty of compliance on disclosure in applying for it, the court is therefore bound not to grant the interlocutory injunction for the buffer zone at the inter partes hearing.

[23] In respect of the inter partes hearing for the interlocutory injunction for the NCR land the conduct of a party in applying for equitable relief has to be looked at, the court finds that the plaintiff had not come with clean hands for this matter over the interlocutory injunction for the NCR land because:

(a) the interlocutory injunction for the NCR land was originally applied for as part of the ex parte interim injunction and would have suffered the same fate as the ex parte interim injunction for the buffer zone if the learned judge had not reserved this matter to be heard inter partes;

(b) the subsequent conduct of the plaintiff in this matter has been dilatory, he had failed to promptly serve the application and Nyipa's affidavit 1 together with the ex parte interim injunction within seven days of the order, the urgency in wanting fast track injunctive relief for the NCR land becomes suspect; and

(c) looking at the pleadings of this application, the plaintiff had failed to conduct the application in an expeditious manner thereby allowing the hearing of this matter to be prolonged (requesting for one month to file affidavit in reply to the first defendant's 3 affidavits), again showing that there was actually no urgency in wanting fast injunctive relief through his original intention to make it part of the ex parte interim injunction.

[24] Under these circumstances the court will find that the conduct of the plaintiff does not warrant the court to exercise its discretion to grant him the interlocutory injunction over the NCR land as well.

[25] Even if the conduct of the plaintiff on this aspect can be overlooked, the court will consider the reserved issue as to whether an interlocutory injunction should be granted over the NCR land. On a cursory consideration of the facts in conjunction with the principles of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 the court will find:

(a) there is a bona fide serious issue made out in respect of whether the NCR land is subject to the plaintiff's NCR;

(b) since the first defendant's project in the NCR land is ongoing, there had been uninhibited entry before for logging before the present re-entry. There is the consideration that if the first defendant's project is delayed it may have serious repercussions financially and on the LPF licenses. The possibility of the plaintiff being unable to pay the loss suffered by the first defendant is another consideration. On a commercial consideration, the balance of convenience lies with the first defendant; and

(c) monetary compensation for the trespass and damage caused to the NCR land will be an adequate remedy to the plaintiff. There is nothing to show that the first defendant would not be able to pay the damages that may be awarded.

[26] The court will find that the plaintiff has failed to make out a case for an interlocutory injunction in respect of the NCR land against the first defendant.

CONCLUSION

[27] The court will dismiss the plaintiff's application for an interlocutory injunction over the buffer zone and the NCR land and for damages to be awarded to the first defendant to be assessed by the senior assistant registrar with costs to the first defendant.

Application for interlocutory injunction dimissed with costs and damages awarded to first defendant to be assessed by registrar.

Reported by Ashok Kumar